

OGC Has Reviewed

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Plaintiff)
v.) C. A. No. 75-1583
CENTRAL INTELLIGENCE AGENCY, et al) FILED
Defendants.) APR 14 1976

JAMES F. DAVEY, Clerk
CLARIFICATION OF ORDER

This Court, by Order dated March 17, 1976, granted defendants' Motion for Summary Judgment and denied plaintiff's motions for partial summary judgment and to strike certain portions of affidavits submitted by officials of defendant Central Intelligence Agency. The plaintiff, on March 25, 1976, moved for clarification of the Court's Order, arguing that Schwartz v. Internal Revenue Service, 167 U.S.App.D.C. 301, 511 F.2d 1303 (1975), requires, as Rule 52 (a) of the Federal Rules of Civil Procedure does not, that upon request of the plaintiff the Court specify its finding of fact and conclusions of law in granting summary judgment in cases arising under the Freedom of Information Act, 5 U.S.C. §552 (1970), as amended, 5 U.S.C. §552 (Supp. IV 1974) ("FOIA").

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The plaintiff [REDACTED] seeks disclosure pursuant to the FOIA of certain files concerning him compiled by the CIA and withheld from him by that agency. It is clear from the record that the files withheld were compiled in the course of a security investigation of plaintiff conducted to assess the security risk of offering him a position as a foreign

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intelligence operative in two overseas missions. These investigations were conducted without plaintiff's knowledge while he was a United States citizen residing in this country.

From the files generated by these investigations fifty-four documents remain at issue, these having been withheld in whole or in part by the CIA upon the authority of certain exemptions contained in the FOIA. These documents have been identified and numbered by defendants in two affidavits

of [REDACTED] and defendants' justifications for withholding all or portions of each document are set forth in letters to plaintiff and in the [REDACTED] and Gambino affidavits, these justifications being carefully correlated by defendants to the numbering system introduced in the Wilson affidavits. In the circumstances of this case, the Court finds defendants' efforts at itemization of documents and of justifications for nondisclosure adequate under Vaughn v. Rosen, 157 U.S.App. D.C. 340, 484 F.2d 820 (1973), cert. den., 415 U.S. 977 (1974).

Of the four exemptions invoked by defendants, namely 5 U.S.C. §552(b)(1), (b)(3), (b)(6) and (b)(7) (hereinafter "(b)(1)," etc.), plaintiff has attacked two, (b)(3) and (b)(7), as unavailable as a matter of law to defendants.

In regard to the (b)(3) exemption, this Court holds, contrary to the position taken by plaintiff, that 50 U.S.C. §403(d)(3), which provides in relevant part that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from

"unauthorized disclosure," is properly invoked by the CIA as authority for nondisclosure under (b) (3) of the FOIA. See FAA Administrator v. Robertson, 422 U.S. 225 (1975); Phillippi v. CIA, Civil Action No. 75-1265 (D.D.C. December 1, 1975), appeal docketed, No. 76-1004, D. C. Cir., December 3, 1975; Richardson v. Spahr, Civil Action No. 75-297 (W.D. Pa. January 30, 1976); S. Rep. No. 93-854, 93d Cong., 2d Sess. at 16 (1974).

With regard to the (b) (7) exemption the Court finds unpersuasive plaintiff's arguments that files generated by the CIA in a domestic security investigation of a potential employee do not come within the exemption for "investigatory records compiled for law enforcement purposes." Subsection (b) (7) itself recognizes that a "lawful national security intelligence investigation" may give rise to records lawfully withheld from disclosure. Moreover, the legislative history of the 1974 amendments to subsection (b) (7) of the FOIA clearly indicates Congress' intention to exempt the investigatory records of "background security investigations." S. Rep. No. 93-1200, 93d Cong., 2d Sess. at 13 (1974). See also Koch v. Department of Justice, 376 F.Supp. 313, 315 (D.D.C. 1974). That the plaintiff was unaware of the investigation of him, that he had not applied for CIA employment, or that he was investigated by the CIA within national borders are all facts which do not, in this Court's opinion, change the legality of the investigation, and hence the secret status of the files generated by the investigation.

These determinations as to the law dispose of the greater part of plaintiff's argument. Plaintiff has actively argued only in the case of the (b)(1) exemption (applying to documents classified under Executive Order) that a genuine issue of material fact prevents summary judgment. Plaintiff feels that in camera inspection of documents numbered 41 to 45 for which (b)(1) is invoked is required to determine defendants' proper compliance with Executive Order No. 11,652, and that the documents are properly classified.

The Court finds, however, that as to not only (b)(1) but also the other three exemptions asserted by defendants, and as to all documents remaining undisclosed in whole or in part, that defendants have sustained their burden of demonstrating that as a matter of fact the withheld information is exempt under the asserted exemptions of the FOIA. The defendants' submitted affidavits and letters to plaintiff in justification of the nondisclosures, together with an examination of those portions of documents which were disclosed, obviate any necessity for in camera inspection of any documents.

In the case of defendants' (b)(1) claims the affidavits of [REDACTED] clearly show, without in camera inspection, that the documents in question were properly classified under Executive Order No. 11,652. See Alfred A. [REDACTED] Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. den. 421 U.S. 992 (1975). In the case of two documents numbered

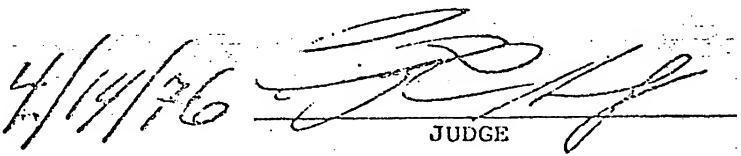
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44 and 46, defendants have withheld disclosure of the names of individuals on the ground of exemption (b) (6). Plaintiff sought summary judgment as to these documents arguing that any interest in avoiding invasion of privacy resulting from the disclosure of mere names is outweighed by plaintiff's interest in disclosure. This Court, however, in examining the portions of the documents which were disclosed, is convinced that defendants properly invoke the exemption.

In view of the foregoing, and in view of the fact that defendants' affidavits, partial disclosures, and explanations given in letters to plaintiff, have adequately indexed, identified and described to the Court the various nondisclosures, and also have satisfied the Court without any need for in camera inspection of the propriety under the claimed FOIA exemptions of those nondisclosures, there appears to be no need for the Court further to detail the specific items withheld and the exemption cited to sustain each. In the circumstances of this case it appears to this Court that the spirit, if not the letter, of Schwartz v. Internal Revenue Service, supra, has no application.

In any event, in the view of the Court, the foregoing Clarification of Order satisfies any legitimate claim of plaintiff under the Schwartz decision and removes any obstacle plaintiff might otherwise encounter in prosecuting his appeal.


JUDGE